



"Kane, Scott A."
<SKane@ssd.com>
05/22/2006 09:37 PM

To Elise.Feldman@usdoj.gov
cc Jason.Barbeau@usdoj.gov, Alan.Tenenbaum@usdoj.gov,
Jeffrey.Sands@usdoj.gov, "Winters, Karen"
<KWinters@ssd.com>, "Brooks, Patrick J."
bcc

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367028

Subject RE: Next Week's Depositions

Elise:

Your email refers to Tetra Tech as a "consulting expert" but we have no basis to evaluate that contention because you have not produced the instrument(s) governing their retention, which we originally requested on May 17. We understand Tetra Tech to have performed services falling outside a traditional "consulting expert" role, including generating raw test data and participating in discussions of site conditions with Environ and the Debtors. It is hard for us to conceive of Tetra Tech as purely a consulting expert where they already have participated in discussions with us regarding the very sites that we are litigating. In any event, it is impossible for us to evaluate your blanket assertion of Rule 26 "consulting expert" immunity where you refuse to produce any support for it.

We also asked on May 17 that you confirm that none of the agencies' experts are relying on opinions, test data, or other facts provided to them by Tetra Tech. Your email below ignores that issue and instead argues that your refusal to respond is justified given our expert's (Gary Vajda's) "blatant reliance on Environ employees." That argument misses the point. Federal Rule of Evidence 703 explicitly permits an expert's reliance on information made known to the expert prior to the hearing. For example, physician experts often "blatantly rely" on x-rays and test results performed by nurses or technicians. The question is not whether an expert relies on information provided by others, it whether the information so relied upon is properly disclosed.

Mr. Vajda's report (expressing his own opinions, as he testified) discloses all the materials he relied upon, including his routine reliance on information provided to him by other Environ employees. In contrast, the "joint report" filed by the agencies (with respect to which we have reserved our rights concerning the failure to comply with Rule 26 expert report requirements) discloses none of the bases for purported expert testimony. Your experts cannot rely on opinions or facts provided to them by Tetra Tech but at the same time expect to shield the nature and source of that information.

Please let me know whether you intend to respond to the requests for information contained in my May 17 email, which will allow Debtors to evaluate and respond to your assertion of absolute "consulting expert" immunity for Tetra Tech. Given our pre-hearing schedule, I look forward to your prompt response. Thanks, Scott.

Scott Kane
Litigation Partner
Squire Sanders - Cincinnati
(513) 361-1240

-----Original Message-----

From: Elise.Feldman@usdoj.gov [mailto:Elise.Feldman@usdoj.gov]
Sent: Monday, May 22, 2006 9:43 PM
To: Kane, Scott A.
Cc: Jason.Barbeau@usdoj.gov; Alan.Tenenbaum@usdoj.gov;
Jeffrey.Sands@usdoj.gov; Winters, Karen; Brooks, Patrick J.; Lerner,
Stephen D.; garypie.catherine@epa.gov; Martin.Thomas@epamail.epa.gov
Subject: RE: Next Week's Depositions

Dear Scott,

We do not plan to make our consulting expert available to you for a 30(b)(6) deposition.

As I pointed out in my earlier email, the plain language of 26(b)(4)(B) precludes your deposing our consulting expert barring a showing of exceptional circumstances -- which you clearly cannot make.

Wright and Miller points to the Advisory Committee notes in stating, "the prime reason for providing some measure of automatic discovery of experts is to allow the adverse party to prepare for effective cross examination and rebuttal. . . Obviously these considerations do not call for discovery as to experts who will not testify. Wright & Miller Sec. 2032 citing Advisory committee Notes, 48 F.R. D. at 503 - 504. Since our consulting expert will not be testifying you have no reason to prepare for cross examination. Indeed, the deposition of our consulting expert would directly contravene the purposes of Rule 26(b)(4)(B). The purpose of the rule is to prevent an advisor from becoming an involuntary witness. Delcastor, Inc. v. Vail Assoc., Inc. 108 F.R.D. 405 (D.Colo. 1985). Accordingly, you are not entitled to this deposition.

And it is not as if we are not producing a testifying expert. Jon Gulch has offered a report and is available for you to depose on Thursday at 8:00am as agreed. You have access to expert opinions on the relevant issues, and can cross examine him on them. Plus you will have experts from the State of Michigan and Ohio to depose and cross as well. This is not a situation in which the only way you could access an expert opinion was through our consulting expert.

You attempt to equate our deposition of EP's current on-site contractors to your desire to depose our consulting expert. This comparison is utterly misplaced. URS, Arcadis and Conestoga-Rovers (CRA), were hired by EP to assess and address environmental contamination on EP properties because those properties require remedial work -- not because of the litigation. Indeed URS is currently under a contract to spend its own money cleaning up the property under a failing remedial plan. An important issue for all of us is whether URS intends to honor its contract after the reorganization is completed. The testimony is clear -- no one at EP or Environ ever asked URS whether it was going to honor the contract, or to what extent it would undertake work under a new remedial plan. Thus URS is an important piece of the funding/work puzzle here -- in and of itself. URS, and CRA and Arcadis are pure fact witnesses who have important information that they are in a unique position to give because of their relationship with the sites -- completely outside of this litigation. You cannot begin to compare that

with our consulting expert.

Furthermore, URS, Arcadis and CRA are not your consultants for litigation -- indeed we learned from the deposition of Mr. Vajda, that he had requested permission to speak with only one of the three. It is also evident that Squire Sanders has not looked to these consultants for advice. You, in fact, largely have ignored their existence, and wish that we had too. So you have no colorable argument that these consultants fall under FRCP 26(b)(4)(B). Your reference to URS, Arcadis and CRA as "EaglePicher's non-testifying experts" is wrong.

Beyond the simple legal arguments laid out above, I would also point out that to the extent you would take the position that our consulting expert is subject to deposition if our testifying expert or any state testifying expert relied on "any opinion, testing data, or other fact obtained by" our consulting expert -- this is a troubling position to take, given your own expert's blatant reliance on Environ employees. At least 8 Environ employees (Mr. Vajda had even forgotten one of their names) provided many of the actual factual bases and opinions set forth in your testifying expert's report. Indeed the report distinguishes Mr. Vajda's opinions expressly from Environ's opinions. If we were to follow your rule, it would behoove us to request enough time from the court to depose all eight of those individuals. At this point, that is not our intention, but I raise this for illustration of our point and reserve all our rights. Unlike your testifying expert who clearly adopts out of whole cloth the observations and opinions of others because he has not done the work himself, our testifying expert has been to every single one of the sites at issue. He has formed his own observations and opinions. And you will have an opportunity to ask him about all of those observations and opinions when you speak with him on Thursday.

I hope this resolves this issue so that we can turn our attention and limited resources towards narrowing issues, and if possible, towards resolving our differences on the important issue of funding this trust.

Good night. Kate will be in Ohio tomorrow. I wish you safe travels.

Elise.

-----Original Message-----

From: SKane@ssd.com [mailto:SKane@ssd.com]

Sent: Monday, May 22, 2006 2:57 PM

To: Feldman, Elise (ENRD)

Subject: FW: Next Week's Depositions

Elise:

We have received no response from you regarding the Tetra Tech issue discussed below (i.e., your assertion that Tetra Tech's status as a purported consulting expert precludes our request for its fact deposition, equivalent to the depositions you requested of EaglePicher's non-testifying consultants). Do you plan to make Tetra Tech available and/or provide the requested information? Obviously, we need to address this issue promptly. Please advise. Thanks, Scott.

Scott Kane
Litigation Partner
Squire Sanders - Cincinnati
(513) 361-1240

-----Original Message-----

From: Kane, Scott A.

Sent: Wednesday, May 17, 2006 7:46 PM

To: 'Elise.Feldman@usdoj.gov'

Cc: Kate.Loyd@usdoj.gov; Jeffrey.Sands@usdoj.gov;

Jason.Barbeau@usdoj.gov; Craycraft, Kenneth R.; piercejc@michigan.gov;

TKern@ag.state.oh.us

Subject: RE: Next Week's Depositions

Elise:

Thanks for your message. We will plan on taking Mr. Gulch's deposition in Gross Ile on May 25. We would like to begin at 9:00 a.m. (EDT). I will attend and Ken Craycraft may join me (depending on the scheduling of the Michigan witnesses). Please let me know if you want us to arrange a court reporter or if you prefer to do it. We do not intend to issue a subpoena or serve a deposition notice unless you want us to. If you do, please let me know as soon as possible.

Regarding Tetra Tech, I find your position impossible to reconcile with your own discovery requests. You are taking the depositions of 3 separate consultants that EaglePicher did not designate as expert witnesses. We are entitled to the same discovery. Your reference to Rule 26(b)(4)(B) is misplaced. Tetra Tech's participation in site meetings, as well as the testing and other services it performed demonstrate that it was not serving in any traditional "consulting expert" role. If you continue to assert otherwise, please: 1) provide a copy of the instrument(s) governing your retention of Tetra Tech and the scope of services it provided; and 2) confirm in writing that none of the experts designated by the United States, Michigan, or Ohio are relying on any opinion, testing data, or other fact obtained from Tetra Tech. We will review that information and let you know whether we intend to issue a subpoena to Tetra Tech.

Finally, we have reviewed the "Scope of Work and Cost Estimate for the EaglePicher Sites" that you filed. Your accompanying notice refers to that document as your "Joint Expert Report." Nomenclature aside, that document does not satisfy the requirement of Rule 26(a)(2). That rule requires the filing of an expert report containing, among other things, "a complete statement of all opinions to be expressed and the basis and reasons therefor [and] the data or other information considered by the witness in forming the opinions." While your Joint Expert Report contains proposed funding numbers, it does not contain any statement of opinions to be offered in support of those numbers, much less "the basis and reasons therefor."

Your filing asserts that your "experts" in this case are employees of the agencies who are neither specially retained nor specially employed to provide testimony and should be excused from providing reports. As communicated previously to Jason Barbeau, we disagree. The category of experts most often excused from filing reports are treating physicians, an exception which does not apply in this case. Other experts are routinely expected to file reports. If your experts in this case intend to offer opinion testimony regarding the basis for your proposed funding numbers, fairness dictates that they disclose those opinions as required by Rule 26. Moreover, Rule 26 exempts non-retained employees from providing reports only where not "otherwise stipulated or directed by the court." In this case, the

Pre-Hearing Scheduling Order to which we agreed explicitly required expert reports. Your failure to provide them is particularly prejudicial to us because we will complete discovery of your experts only a few business days before the hearing where you intend to offer their opinion testimony.

I mention this issue not to precipitate dispute now, but rather just to make you aware of our continued disagreement with your failure to provide expert reports that disclose and support any opinion testimony you intend to offer. Please note that we reserve our right to seek to exclude or limit the opinion testimony to be offered by your proposed experts.

I am available to discuss any of these issues in more detail at your convenience.

Scott Kane
Litigation Partner
Square Sanders - Cincinnati
(513) 361-1240

-----Original Message-----

From: Elise.Feldman@usdoj.gov [mailto:Elise.Feldman@usdoj.gov]
Sent: Wednesday, May 17, 2006 1:06 PM
To: piercejc@michigan.gov; TKern@ag.state.oh.us; Kane, Scott A.
Cc: Kate.Loyd@usdoj.gov; Jeffrey.Sands@usdoj.gov;
Jason.Barbeau@usdoj.gov; Craycraft, Kenneth R.
Subject: RE: Next Week's Depositions

Scott,

Thanks for your email. We will plan for the 25th at EPA's office in Grosse Ile (just outside of Detroit). We will reserve a conference room for that purpose. How many people will you be bringing?

Regarding the States' scheduling, I understand they are discussing that issue, looking into their witnesses' schedules and trying to avoid overlapping unduly, so they tell me they will be letting you know shortly.

Having reviewed his report, we have decided that it will not be necessary to depose your appraiser.

On your plan to depose Tetra Tech under 30(b)(6) -- you are not entitled to take that deposition. Tetra Tech has no connection to this case other than through USEPA and USDOJ attorneys for this particular litigation and is a non-testifying consulting expert. Federal Rule of Civil Procedure 26(b)(4)(B) prevents your taking discovery of such an expert. You have access to our testifying expert, Jon Gulch, so you can have no argument that you are unable to access opinions on the same subject, and you could not possibly show exceptional circumstances.

Accordingly, please let us know as soon as possible whether you will still be noticing the 30(b)(6) of Tetra Tech so that we may take the appropriate action in response. I would be happy to discuss this with you further, if you'd like. Thank you.

Elise.

-----Original Message-----

From: SKane@ssd.com [mailto:SKane@ssd.com]
Sent: Tuesday, May 16, 2006 6:44 PM
To: Feldman, Elise (ENRD); piercejc@michigan.gov; TKern@ag.state.oh.us
Cc: Loyd, Kate (ENRD); Sands, Jeffrey (ENRD); Barbeau, Jason (ENRD);
KCraycraft@ssd.com
Subject: RE: Next Week's Depositions

Yes, we want to take the depositions of at least John Gulch, Michael Starkey, Jeff Lippert, Michael Wilcznski, Ray Spaulding, and a 30(b)(6) representative of TetraTech. We understand that Mr. Gulch is available only on May 25 and will plan to take his deposition that day in EPA's office in Detroit. Please let us know where the Michigan and Ohio witnesses will be produced for deposition and we will respond with specific dates and times during the week of May 22-25. If we determine that we want to take other depositions, we will let you know as soon as possible this week. Thanks.

Scott Kane
Litigation Partner
Squire Sanders - Cincinnati
(513) 361-1240

-----Original Message-----

From: Elise.Feldman@usdoj.gov [mailto:Elise.Feldman@usdoj.gov]
Sent: Tuesday, May 16, 2006 5:41 PM
To: Kane, Scott A.; Craycraft, Kenneth R.
Cc: Jason.Barbeau@usdoj.gov; Jeffrey.Sands@usdoj.gov;
Kate.Loyd@usdoj.gov
Subject: Next Week's Depositions

Are you planning any depositions next week? Please let me know as soon as possible so that we can plan our travel. Thank you. Elise.